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(4)

No. 07-515

IN THE
Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. The petition's principal argument is that retrial will violate double jeopardy because Carpenter has already been subjected to one complete trial, through verdict, at which the evidence was constitutionally insufficient. The government acknowledges that interlocutory appellate review is necessary and appropriate to vindicate any even "colorable" double jeopardy argument. It claims that Carpenter's double jeopardy claim is no longer colorable because it is foreclosed by "the reasoning" of *Richardson v. United States*, 468 U.S. 317 (1984). Opp. 8. That is plainly incorrect.

The defendant in *Richardson* sought sufficiency review after a mistrial due to a hung jury, while Carpenter seeks review following a complete trial ending in a jury verdict. The government argues "that distinction does not warrant a different result," Opp. 12, but its superficial and formalistic analysis never acknowledges the many reasons that mistrials after a hung jury *are* different in important ways than trials that have proceeded all the way through jury verdict. When measured against the actual reasoning of *Richardson*, and the policies that this Court has repeatedly held underlie the Double Jeopardy Clause, this situation is far closer to *Burks v. United States*, 437 U.S. 1 (1978), than to *Richardson*—with the exception, of course, that Carpenter did not rob a bank and (because he had the misfortune of being subjected to a trial with

procedural flaws as well as deficient evidence) did not receive appellate review of his sufficiency claim.

First, this Court anchored *Richardson* in the mistrial rule's "own sources and logic ... established for 160 years." 468 U.S. at 323. It concluded that "Justice Holmes' aphorism that 'a page of history is worth a volume of logic' sensibly applies here," *id.* at 325–26, and that retrial has always been permitted after mistrial because "unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict" do not implicate the "type of oppressive practices at which the double-jeopardy prohibition is aimed," *id.* at 324–25. That history is irrelevant here.

The only historical precedent supporting the government's position in *this* case was explicitly rejected in *Burks*. The traditional rule was that a defendant could be retried after a jury verdict of guilty, *because the defendant was thought to waive his double jeopardy rights by requesting a new trial.* But *Burks* expressly held that "[t]o the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." 437 U.S. at 18. This case just calls on this Court to enforce the necessary and obvious implications of that holding for double jeopardy analysis. It also presents a circumstance this Court could never have anticipated in *Richardson*—because the government had no right

to appeal the grant of a new trial until 18 U.S.C. §3731 was amended later that same year.

Second, the principal interest tilting the double jeopardy calculus in the government's favor in *Richardson* strongly supports the defendant here. This Court has long recognized "'society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws,'" *Richardson*, 468 U.S. at 324 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). Thus, the government is entitled to "one full and fair opportunity to present [its] evidence," *Washington*, 434 U.S. at 505, "to offer whatever proof it could assemble," *Burks*, 437 U.S. at 16, and "to resolution of the case by verdict from the jury," *Richardson*, 468 U.S. at 326. A hung jury—unlike the case "in which the trial has ended in an acquittal or conviction"—deprives the government of that "one full and fair opportunity" because no jury has decided the "merits of the charges against the accused," *Washington*, 434 U.S. at 505, and "the defendant has neither been condemned nor exculpated by a panel of his peers," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977).

Here, the government presented all of its evidence *and* received a verdict on the merits of the charges from the jury. Unlike a hung jury but exactly like an acquittal, the guilty verdict "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. If the government failed to present a constitutionally sufficient case for guilt, it has no

legitimate interest left to vindicate. And the fundamental policy "lying at the core of the Clause's protections," of "prevent[ing] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), weighs heavily in the defendant's favor. At a minimum, this must be true where, as here, the new trial ruling was based on prosecutorial misconduct *after* the close of evidence. *See Amicus* Br. of NACDL 2–3, 17–19. The government has offered all of its proof, and is in no position to "argue that additional evidence would have been presented, or that different trial strategy would have been pursued, had reversible error not been committed." *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981).

The opposition's gloss on the underlying facts is both irrelevant and misleading. Of course the important legal issues presented here do not require this Court to delve into the facts. But the government simply refuses to acknowledge the glaring weaknesses in its case that led the prosecutors to believe they had to cross the line in closing arguments to secure a conviction. Even a cursory review of the record reveals that the government failed to introduce, much less prove, any *actus reus*, any *mens rea*, or any concurrence of the two as required by *Morissette v. United States*, 342 U.S. 246 (1952). Although the prosecution initially charged Carpenter with making written and oral misrepresentations to investors, it abandoned those allegations after it became clear that BPE President Martin Paley drafted all the materials and handled all the communications. Two FBI agents testified at

trial that Paley lied to them about his and Carpenter's respective roles. The jury was ultimately charged on a theory of alleged half-truths and *omissions*—although the integrated contract gave BPE sole investment discretion, and Carpenter plainly had no affirmative duty to disclose how the Exchangors' funds would be invested. (The law prohibits a qualified intermediary from undertaking any fiduciary or quasi-fiduciary responsibilities to investors). At most this case involved a breach of contract, which certainly does not rise to a "scheme to defraud." *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 790 (1st Cir. 1990). As a company BPE successfully completed over $100,000,000 in exchange transactions for 119 of 126 Exchangors. And PaineWebber has subsequently been held *fully* responsible for having caused all of the Exchangors' losses. *See generally* Pet. 5–7 and accompanying footnotes. There was no crime here.

2. The government argues that review is unwarranted because the courts of appeals have generally extended *Richardson*'s reasoning to this situation. Opp. 13. But it ignores the pervasive confusion and disarray in the case law, as well as the broad consensus in the courts of appeals that the government's proposed rule is plainly inefficient and unfair—even if they have reluctantly concluded that it is the best reading of *Richardson*'s ambiguous language.

First, the government does not dispute that, in the years following *Richardson*, many courts of appeals held that the Double Jeopardy Clause *did*

require them to address alternative sufficiency arguments even if they were reversing for a new trial. Pet. 20–21. More recently, the dominant trend has been to hold that sufficiency review is not technically compelled, but there remains, at a minimum, serious disarray in the decisions. *Id.* For example, the government cites *United States v. McAleer*, 138 F.3d 852 (10th Cir.), *cert. denied*, 525 U.S. 854 (1998), while disregarding the contrary analysis in *United States v. Wiles*, 106 F.3d 1516 (10th Cir. 1997), and *United States v. Haddock*, 961 F.2d 933 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992), from the same court. *See also, e.g., United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990) ("[E]ven though we reverse appellant's convictions on Rule 403 grounds, it is still necessary to reach his claim of insufficient evidence ...[I]f he were to prevail on this claim, the double jeopardy clause would bar his retrial....").

Second, several courts of appeals have explicitly noted their dissatisfaction with this extension of *Richardson*. The Seventh Circuit has recognized "the logical and legal merit" of refusing to apply *Richardson* to this context, *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir.), *cert. denied*, 493 U.S. 841 (1989); *see also United States v. Ganos*, 961 F.2d 1284, 1286 (7th Cir. 1992) (Ripple, J., concurring) (explaining that an extension of *Richardson* "does not follow inexorably"), the Ninth Circuit has lamented its "unfortunate effect," *United States v. Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), and the Sixth Circuit has decried its "unsatisfying result" *Patterson v. Haskins*, 470 F.3d 645, 657 (6th Cir. 2006), *cert. denied*, 128 S. Ct. 90 (2007).

The government also does not deny that all of the courts of appeals, and some state courts, have explicitly adopted a prudential practice of reviewing alternative sufficiency arguments when presented as a matter of efficiency and fundamental fairness. Pet. 21–22. Although the lower courts have generally read *Richardson* to support the rule the government urges here, those courts have found that result so inappropriate and inconsistent with the basic values of the criminal law (including the values protected by the Double Jeopardy Clause) that they have rejected as a practical matter what they have felt constrained to embrace as a formal matter. Although the lower courts may be bound to read tea leaves in this Court's opinions even when they appear to produce "unfortunate" or "unsatisfying" results, the function of this Court is to correct such misimpressions.

Third, following either a panel's erroneous refusal to consider the sufficiency question on the first appeal, or following the grant of a *third* trial, the Seventh and Ninth Circuits have held that a defendant can challenge the sufficiency of the evidence *at his first trial* after a conviction at his second trial. *See Douglas*, 874 F.2d at 1150–51; *United States v. Anderson*, 896 F.2d 1076, 1078 (7th Cir. 1990); *United States v. Jimenez Recio*, 371 F.3d 1093, 1104–05 (9th Cir. 2004). Those rulings are clearly based on the Double Jeopardy Clause or the underlying values it is meant to protect—although of course the review they offer is a poor substitute for sufficiency review prior to the second trial. *See Abney v. United States*, 431 U.S. 651, 662 (1977) ("[I]f a criminal defendant is to avoid *exposure* to

double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge ... must be reviewable before that subsequent exposure occurs.").

In stark contrast, the First, Third, and Fourth Circuits have held that the sufficiency of the evidence from the first trial can *never* be challenged on appeal. *United States v. Julien*, 318 F.3d 316, 321 (1st Cir.), *cert. denied*, 539 U.S. 968 (2003); *United States v. Ntreh*, 142 Fed. Appx. 106, 109–10 (3d Cir. 2005); *United States v. Williams*, No. 92-5248, 1993 U.S. App. LEXIS 24718, at *9–10 (4th Cir. Sept. 24, 1993).

This conflict further illustrates the continuing disharmony and confusion in the courts of appeals—and their fundamental discomfort with the implications of extending *Richardson* from the mistrial context to cases like this one.

3. The government's attempt to distinguish *United States v. Greene*, 834 F.2d 86 (4th Cir. 1987), is simply wishful thinking.

First, it argues that *Greene* "does not squarely conflict" with the decision below because the government supposedly "'abandoned'" its jurisdictional argument, and the Fourth Circuit "appears" to have viewed that "as significant." Opp. 17. The requirements of the collateral order doctrine are jurisdictional, so it is irrelevant whether the government "abandoned" any argument. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863,

869 n.3 (1994) ("We have of course held that the *Cohen* requirements go to an appellate court's subject-matter jurisdiction, and thus, were it necessary here, we would be obliged to assess whether each condition was met, without regard to whether the parties believe it to be satisfied.") (internal citation omitted). The Fourth Circuit had an independent obligation to address the jurisdictional issue and it did so. 834 F.2d at 89 ("We find that this court does have jurisdiction to consider the appeal of the defendant....").

Second, the government argues that the Fourth Circuit may, at some future point, decide to reject its prior decision. That is pure speculation, and the same could be said of *any* conflict among the circuits. The Fourth Circuit's view is as likely to gain additional adherents as to be reconsidered by that court. Indeed, Judge Kozinski has argued that his court should reach a defendant's alternative sufficiency argument when the government files an interlocutory appeal. *See United States v. Keating*, 147 F.3d 895, 904–05 (9th Cir. 1998) (Kozinski, J., concurring).

4. The government tries to manufacture a vehicle problem by arguing that Carpenter "raised double jeopardy concerns only to support his argument that the denial of a motion to acquit should be treated as a collateral order subject to immediate appeal," Opp. 12 n.4, and suggests that Carpenter instead should have filed a separate motion to dismiss on double jeopardy grounds, and should then have taken a separate appeal from the denial of that motion. In

other words, it contends that there is a jurisdictionally significant difference between an argument that appellate review of a sufficiency claim is appropriate because double jeopardy prohibits retrial if the evidence is insufficient, and an argument that double jeopardy prohibits retrial because the evidence was insufficient. This is pure sophistry.

First, it is difficult to see how Carpenter *could* have filed a separate double jeopardy motion. Immediately after the court granted Carpenter's new trial motion, the government filed its notice of appeal, divesting that court of jurisdiction. Surely the reviewability of a defendant's claim cannot turn on whether the government wins the race to the courthouse and gets its notice of appeal filed before the defendant can file a separate motion to dismiss.

Second, the government is essentially arguing that Carpenter should file a new motion to dismiss on double jeopardy grounds as soon as this case returns to the district court, and then pursue a renewed interlocutory appeal under the collateral order doctrine pursuant to *Richardson* and *Abney*. But it makes no sense to insist that a defendant present an argument that double jeopardy bars retrial, because of evidentiary insufficiency at the first trial, via a second interlocutory appeal rather than by cross-appeal when the government already has brought the case before the court of appeals.

5. The government also argues that Carpenter's claim cannot be appealed under the collateral order

doctrine because it is not separable from the merits of his sufficiency challenge. But this Court recognized in *Richardson* that if a defendant "seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy," 468 U.S. at 322, the collateral order doctrine is satisfied. Carpenter is clearly entitled to review of whether a conviction terminates jeopardy under these circumstances. And if a conviction *does* terminate jeopardy when the evidence is constitutionally insufficient, he is entitled to review of his sufficiency challenge—no matter how "entwined" with the merits it may be.

And even if this Court were inclined to extend *Richardson* and give the Double Jeopardy Clause a rigid and formal interpretation that would not itself support interlocutory review here, there is no reason to interpret the collateral order doctrine so narrowly, especially when the government has already taken an interlocutory appeal. The government concedes that the courts of appeals (and some state courts) have uniformly held that from the standpoint of fundamental fairness and judicial economy they will review alternative sufficiency arguments before ordering a retrial *even if doing so is not compelled by the Double Jeopardy Clause.* That same reasoning supports jurisdiction under the collateral order doctrine, born out of a flexible and pragmatic interpretation of finality, once the government has already initiated the appellate process.

The government also does not deny that the courts of appeals are deeply divided over the applicability of pendent jurisdiction in criminal cases, and that the Court could resolve the conflict in this case. Pet. 26–28. It instead asserts that the First Circuit made some "factual" finding that the government's appeal and Carpenter's cross appeal were not "inextricably intertwined." Opp. 19–20. The First Circuit held only that there is no "efficiency" exception to the collateral order doctrine, and that to address Carpenter's cross-appeal it would have to engage with issues outside the four corners of the government's appeal. Pet. App. 31a–33a. That is true in *every* case where a court finds pendent jurisdiction. There is nothing "factbound" about the First Circuit's analysis.

6. The opposition conspicuously has no response to the petition's demonstration that the rule the government extracts from *Richardson* is inconsistent with fundamental fairness, judicial economy, and the basic values underlying the Double Jeopardy Clause. Indeed, the government effectively concedes that *none* of the policy concerns weighing against interlocutory appeals in criminal cases—or favoring retrial after mistrials—are relevant here. Pet. 28–33. It offers no real defense of the result here at all, beyond its formalistic interpretation of *Richardson*'s "continuing jeopardy" principle. This Court has recognized that "continuing jeopardy" is a formal construct that must yield to the actual purposes of the Double Jeopardy Clause in appropriate cases. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). A similarly practical interpretation is appropriate here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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